JUL 8 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 247

HENDERSON SUPPLEE, JR., MRS. MARIE SUPPLEE DICKSON and MRS. ELIZABETH S. KIRK, Executor and Executrices of the Will of C. Henderson Supplee, Deceased, and MRS. C. HENDERSON SUPPLEE, Surviving Wife,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

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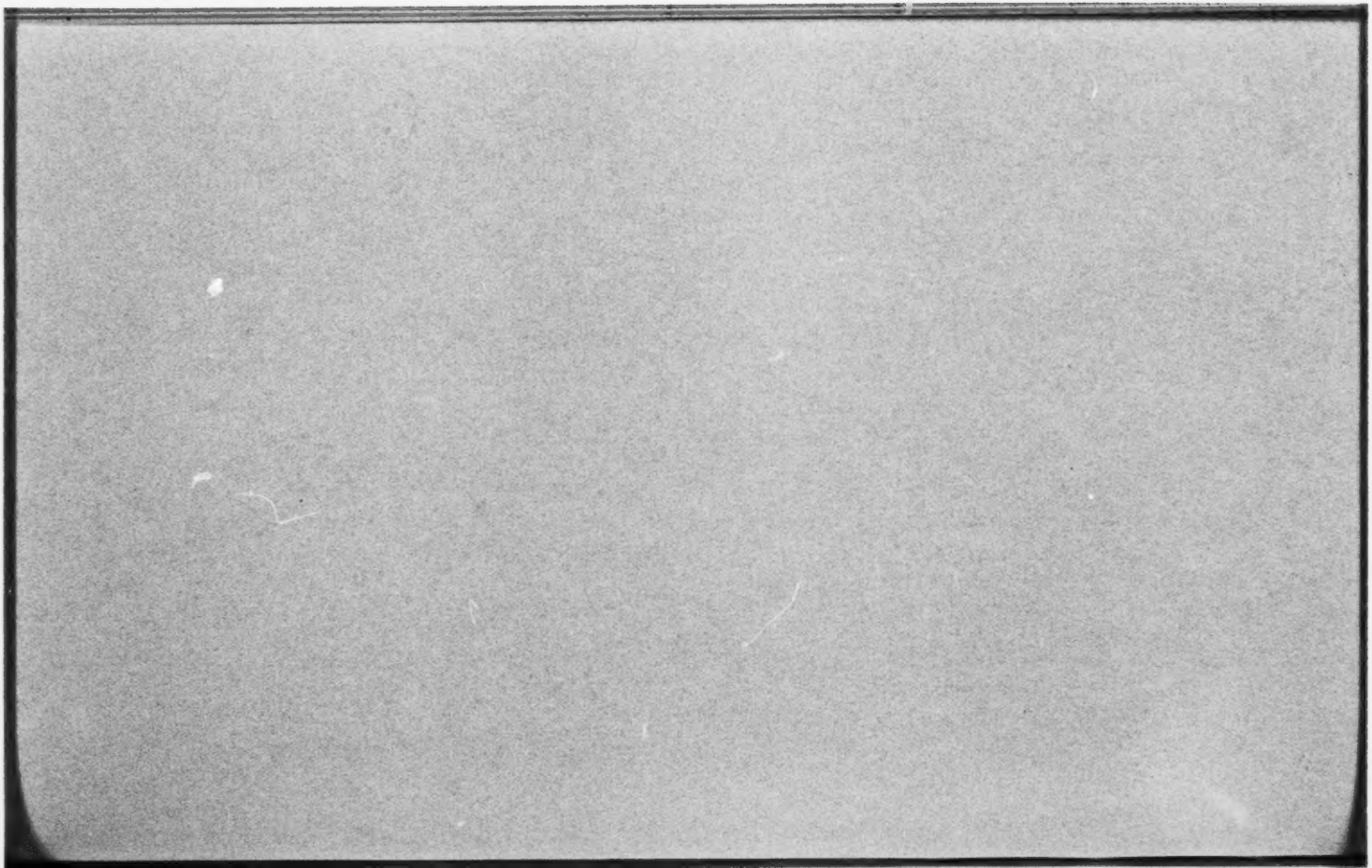

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IN THE

Supreme Court of the United States.

No. . October Term, 1941.

HENDERSON SUPPLEE, JR., MRS. MARIE SUPPLEE DICKSON AND MRS. ELIZABETH S. KIRK, EXECUTOR AND EXECUTRICES OF THE WILL OF C. HENDERSON SUPPLEE, DECEASED, AND MRS. C. HENDERSON SUPPLEE, SURVIVING WIFE,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Henderson Supplee, Jr., Mrs. Marie Supplee Dickson and Mrs. Elizabeth S. Kirk, Executor and Executrices of the Will of C. Henderson Supplee, deceased, and Mrs. C. Henderson Supplee, Surviving Wife, the petitioners above named, respectfully pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit affirming a decision of the Board of Tax Appeals. Judgment was rendered in the Circuit Court of Appeals April 8, 1941, their number 7422.

The appeal was from a final decision of the Board of Tax Appeals holding that there was a deficiency in income tax of C. Henderson Supplee, deceased, due for the year 1932 in the amount of $38,711.11.

Summary Statement of Matters Involved.

Petitioners are the executor, executrices and surviving wife of C. Henderson Supplee, deceased. The respondent, Commissioner of Internal Revenue, assessed a deficiency in income tax of the deceased for the year 1932 in the amount of $42,484.96, disallowing a deduction from gross income of $329,430 representing a loss sustained on an investment in stock of the Franklin Trust Company, also disallowing a deduction of $10,000 being a loss on a one-thirteenth interest in Franklin Trust Company stock which accompanied a Pennsylvania Company note, also disallowing a deduction of $120 in charitable gifts and in reducing a loss as an endorser on the note of the Pennsylvania Company from $30,066.66 to $22,374.25.

The petitioners thereupon appealed to the Board of Tax Appeals which allowed the deduction of $120 for charitable gifts and the deduction on the note of the Pennsylvania Company in the full amount of $30,066.66, and reduced the total deficiency to $38,711.11. The Board of Tax Appeals refused to allow the loss on the Franklin Trust Company stock, claiming the loss should have been taken in 1931, the year in which the bank closed. A great deal of testimony was taken at the hearings before the Board of Tax Appeals. The Circuit Court of Appeals affirmed the decision of the Board of Tax Appeals.

Question Presented.

This case presents the question whether the stock of a bank becomes worthless in the year in which the bank was taken over by the Secretary of Banking at the request of the bank's officers and a receiver appointed during which time efforts were being made to reopen the bank, or does the stock become worthless in the following year when the appraisers were appointed and they filed and published their report and all efforts to reopen the bank ceased.

To determine this question, it is necessary for the court to decide whether such is a mixed question of law and fact, and therefore one in which the appellate court has the right to substitute on appeal its judgment for that of the Board of Tax Appeals.

Reasons Relied Upon for the Allowance of the Writ.

(1) The United States Circuit Court of Appeals for the Third Circuit has decided an important question of law in conflict with the decision of the United States Court of Claims on the same question.

Lyon v. United States, 5 Fed. Supp. 138;
Bancroft v. United States, 33 Fed. Supp. 225.

(2) The United States Circuit Court of Appeals for the Third Circuit has decided an important question of law by affirming a decision of the Board of Tax Appeals which is in conflict with other decisions of the Board of Tax Appeals on the same question.

Wesley V. E. Terhune v. Commissioner, 40 B. T. A. 750;
John A. Watson, Jr. v. Commissioner, 38 B. T. A. 1026.

(3) The United States Circuit Court of Appeals for the Third Circuit has decided an important question of law in conflict with the decision of the District Court of Arkansas.

Sherill v. Adkins, 394 C. C. H. P. 9408.

Wherefore, it is respectfully prayed that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, their number 7422, and that the judgment of said United States Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem just and proper and your petitioners will ever pray.

HENDERSON SUPPLEE, JR., MRS. MARIE SUPPLEE DICKSON and MRS. ELIZABETH S. KIRK, Executor and Executrices of the Will of C. Henderson Supplee, Deceased, and MRS. C. HENDERSON SUPPLEE, Surviving Wife,

Petitioners.

LOUIS A. SPIESS,
HARRY J. ALKER, JR.,

Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Error to Be Assigned.

The Circuit Court of Appeals erred in affirming the decision of the Board of Tax Appeals.

Argument.

1. This case involves a mixed question of fact and law.

The effect of the action of the Circuit Court in affirming the Board of Tax Appeals was to establish the rule that the stock of a bank becomes worthless upon the closing of the bank even though the appraisers do not file their report until the following year. The Board of Tax Appeals held as a fact that the stock of the Franklin Trust Company became worthless in 1931. The Circuit Court refused to reverse the Board of Tax Appeals because that court felt it was just a question of fact and therefore it lacked the power to reverse the Board's decision. But it is respectfully submitted this involves a mixed question of fact and law, and the Circuit Court did have the right to reverse the Board of Tax Appeals.

Helvering v. Rankin, 295 U. S. 123, 131;
Helvering v. Tex-Penn Co., 300 U. S. 481, 491.

One of the chief reasons advanced by the Commissioner of Internal Revenue that the stock become worthless

in 1931 was that a receiver was appointed at that time. But in Pennsylvania a receiver may be appointed for a corporation even though it is solvent: *Cunliffe v. Consumers Asso. of America,* 280 Pa. 263, 267; *Deere Plow Co. v. Hershey,* 287 Pa. 92, 99; *Schipper Bros. v. Economy Coal Co.,* 277 Pa. 356, 362; *Cowan v. Pa. Plate Glass Co.,* 184 Pa. 1, 9. The same rule was laid down by the United States Court of Claims in *Lyon v. United States,* 5 Federal Supplement 138. The court in that case said on p. 139:

> "It is generally held that the mere appointment of a receiver or even a showing of bankruptcy of a corporation is not sufficient in itself and alone to entitle a taxpayer to deduct the cost of the stock in such corporation as worthless. For all this may happen merely because the corporation is unable to meet its obligations in the ordinary course of business. . . ."

From this it is clear that the question involved here was more than just a question of fact. The determination of the assets to the liabilities as set forth in the appraiser's report which was filed the year after the bank closed was a question of fact. But the effect of the closing of the bank, and the appointment of the receiver in one year and the filing of the appraiser's report the following year was a mixed question of law and fact. This is all the more true when it is considered that from the time the bank closed until the appraiser's report was filed efforts were being made to reopen the bank. The decedent taxpayer himself was very active in these efforts. Moreover the Secretary of Banking took possession of this bank, not of his own initiative, but at the request of the officers of the bank. This request was made to prevent three depositors from withdrawing $1,000,000 at one time. The bank had borrowed the

$1,000,000 to make itself more liquid and when three depositors attempted to withdraw the entire amount, the officers of the bank decided it was better to request the Secretary of Banking to take over the bank and let all the depositors thereby benefit rather than preferring the three large depositors.

2. The decision of the Board of Tax Appeals as affirmed by the Circuit Court was not supported by substantial evidence.

There was some evidence to sustain the Board of Tax Appeals' decision, but the substantial evidence was in favor of the petitioners. The bank closed in October 1931, and a receiver was appointed. The evidence offered in behalf of the Commissioner was a photostatic copy of the order to liquidate made in December 1931 and the certificate of taking possession. The chief witness for the Commissioner was Dr. Sullivan who was the special deputy for the Secretary of Banking. He testified that the question of assets and liability was not definitely settled until the inventory and appraisement were filed in 1932 (Petitioners' Appendix, pp. 45, 46, and 47). From this it is apparent no one knew the true situation until 1932.

As against that evidence, the petitioners produced a number of witnesses, including the Secretary of Banking, who testified the bank was not insolvent. One of the witnesses, Mr. Conro, a vice-president of the bank, testified as to an appraisal made by the Pennsylvania State Department of Banking a few months before the bank closed. That appraisement showed a value of $6,500,000 giving the stock a book value of $21½ a share. There was also a great deal of evidence as to efforts being made to reopen the bank. All this, it is submitted, was sufficient to rebut the evidence

offered by the Commissioner as well as the presumption in favor of the Commissioner, especially in view of the decision in *B. F. Edwards v. Commissioner,* 39 B. T. A. 735. In that case the Board of Tax Appeals decided that the production of the book value of stock is sufficient evidence to shift the burden of proof to the Commissioner. Therefore, the burden of proof was actually on the Commissioner to establish the stock became worthless in 1931, not on the petitioners. In view of the evidence, the Commissioner did not substantially meet the burden of proof. Even if the presumption were still in favor of the Commissioner, and the burden was on the petitioners, the evidence shows the petitioners more than meet any presumption in favor of the Commissioner. The evidence was substantially in favor of the petitioners, not the Commissioner. Hence the Circuit Court of Appeals had the right to reverse the Board of Tax Appeals and erred in failing to do so.

Helvering v. Rankin, 295 U. S. 123, 131;
Helvering v. Tex-Penn Co., 300 U. S. 481, 491.

3. The decision of the Circuit Court is in conflict with decisions of the Board of Tax Appeals, Court of Claims and District Court.

The Board of Tax Appeals in *Wesley V. E. Terhune v. Commissioner,* 40 B. T. A. 750, held that the stockholder could not deduct a loss on the stock of a corporation until 1934 although a receiver had been appointed for the corporation on January 16, 1932. Yet the Board in the present case felt that one of the main reasons why the loss should be in 1931 was because the receiver had been appointed in 1931.

A case involving bank stock which was decided in favor of the taxpayer and was very similar to the case at bar is

John A. Watson, Jr. v. Commissioner, 38 B. T. A. 1026. This decision was acquiesced in by the Commissioner. In that case the petitioner invested in the capital stock of the Union Trust Company at Cleveland, Ohio, to the extent of $46,340. In 1934 he claimed on his income tax return that the stock was worthless. The Government disallowed this claim because it claimed that it should have been deducted in 1933. The Board found as a fact that in 1932-33 there were large withdrawals of cash and that a large amount of the liquidated assets was deposited with the Reconstruction Finance Corporation in 1933. After the banking holiday this particular bank did not reopen. On April 8, 1933, a conservator was appointed by Superintendent of Banks of Ohio. On June 15, 1933, the Superintendent took possession, appointing a Liquidator because the Superintendent of Banking felt that this institution was in an unsound and unsafe condition due to the frozen condition of its assets and not to insolvency. On June 15, 1933, the book value of the assets showed a margin over the liabilities of 25%. An appraisal was begun in July or August of 1933, but was abandoned. A later appraisal was started on January 3, 1934, and completed in July, 1934. On August 1, 1934, an assessment was made against the stockholders. Between the closing of the banking holiday and assessment against the stockholders there were numerous plans to reorganize and reopen the bank, all of which fell through. Now the Board of Tax Appeals in its opinion on page 1032 said:

> "To be deductible in 1934 this loss must be fixed by events which would satisfy neither 'an incorrigible optimist' nor a confirmed pessimist. Although these events need not be ascertained by the taxpayer to support a deductible loss . . . they must be such events as would clearly evidence to the person of average in-

telligence under the circumstances that no probability of realization of anything of value from this investment by sale, liquidation, or otherwise, thereafter existed . . ."

"Neither the appointment of a Conservator nor that of a Liquidator 'fixed' the loss here. Jarvis v. Heiner, 39 Fed. (2d) 361; Burnet v. Imperial Elevator Co., 66 Fed. (2d) 643; W. W. Hanly, 6 B. T. A. 613; Oscar K. Eysenbach, 10 B. T. A. 716. The bank was the largest in Cleveland. So far as was then known, it was solvent. The book value of its assets then exceeded its liabilities by a margin of about 25 per cent. Its only disclosed difficulty was the disproportionate depletion of its cash and liquid assets to other assets. Attempts at reorganization and reopening were continuing with the open encouragement of the state banking department. No assessment of the shareholders' liability was then made. Certainly, then, nothing happened in 1933, which eliminated the reasonable probability that petitioner would realize something from this stock, unless it was the 'interim report' of the Liquidator during the last day of that year."

In the *Watson* case there was no sales of the stock after the bank closed. This was also true of the Franklin Trust Company, and was another reason for the Board deciding against the taxpayer. But the Board in the *Watson* case on page 1034 said:

"Failure, as here, to show sales of this stock during 1933, undoubtedly tends to show absence of market value for this stock in that year. But we do not consider it decisive in the present circumstances, on the question of reasonableness of petitioner's hope of realizing from the liquidation of this stock at the end of that year."

The Court of Claims in *Bancroft v. U. S.*, 33 F. Supp. 225, held that stock did not become worthless in the year in which the bank closed. The court on p. 234 said:

> "The bank was closed not because it was insolvent, but because confidence in it had been impaired and because the deposits were constantly declining, culminating in a run on the bank for several days prior to its closing. No bank, of course, maintains its affairs in a sufficiently liquid state to pay all of its depositors at one time. For exactly this reason it was necessary for it to close its doors and liquidate its affairs gradually. There is nothing to indicate that such a gradual liquidation would not have produced amounts sufficient to return to the stockholders their investment or a substantial part thereof, except only the fact that no institution can realize from its assets as much as it can as a going concern. But while this made the value of the stock decline in value, it certainly did not make it worthless.
>
> . . . . . .
>
> The mere closing of the doors of this bank did not make its stock worthless."

The facts in that case were very similar to those in the Franklin Trust Company. The Franklin Trust Company closed due to a lack of cash and the frozen condition of its assets. Plans were made to *reorganize and reopen* the bank, not just to liquidate it as in *Bancroft v. United States* (supra). Therefore, the closing of the Franklin Trust did not make the stock worthless at that time, especially since the bank closed voluntarily. All reasonable possibility to recover something on the stock did not disappear until all plans to reorganize and reopen had been abandoned which did not happen until after the appraisal was filed in 1932.

The Court of Claims has likewise ruled in *Lyon v. United States* (supra), that a loss on stock cannot be taken until it actually becomes worthless. Even the appointment of a receiver or a showing of bankruptcy is not sufficient to establish a loss, the court ruled. The receiver was appointed in 1925, yet the court held the loss did not occur until 1927.

The District of Arkansas in *Sherill v. Adkins*, 394 C. C. H. p. 9408, decided that certain bank stock became worthless in 1934. The bank was taken over for management by the Banking Commissioner in 1933. Notice of an assessment against the stockholders was sent out in 1933, but no steps taken to collect on the assessment until 1934. The court said:

> "It is true there is some evidence showing impairment of the stock in 1933, *but not to the extent that it was worthless* and it is evident that the Commissioner (Banking) himself had not come to that conclusion in 1933 and it is evident that he had come to the conclusion when the call on the stock of 1934 was made. I really think the taxpayer, as long as he or the Commissioner (Banking) had hopes of the bank paying out, would not be justified at that time, which would be in 1933, in asking a charge off in his income tax, and the proper time for this charge off would be in 1934."

In the present case both the decedent taxpayer, a member of the various committees trying to work out a plan to reopen the bank, and the banking department had high hopes all during 1931 that the bank would be reopened. It was not until after the appraisal was filed in 1932 at which time several Philadelphia banks suffered runs causing a generally upset condition, that the taxpayer gave up all hope of being able to realize anything on his stock.

Taxation is a matter of practical construction, especially as to losses. The courts have also held that a taxpayer is not entitled to deduct a loss for worthless stock until all reasonable possibility of getting something out of the stock has been destroyed (*Montgomery v. U. S.*, 23 Fed. Supp. 130). In view of the facts and circumstances surrounding the closing of the Franklin Trust Company, certainly the decedent taxpayer acted as a reasonable man. In view of all the efforts to reopen the bank in which the decedent taxpayer was very prominent, it cannot be said that all reasonable possibility of getting something out of the stock had disappeared until after the appraisal was filed in 1932.

4. The case of In re Hoffman, 16 Fed. Supp. 391, affirmed 87 Fed. 2d 200, was not the proper basis or authority for the Circuit Court's decision.

The *Hoffman* case arose out of a bankruptcy proceeding. The Commissioner claimed certain deficiencies in income tax for several years. The bankrupt attempted to set up a loss on Franklin Trust Company stock for the year 1932 and thus reduce the deficiency in income tax for that year. Several meetings of creditors were held. The testimony on the Franklin Trust Company phase of the *Hoffman* case was very meagre. Several employees of the banking department testified that the Department did not know what the relation of the assets and liabilities was until 1932 when the appraisal was filed. It was also brought out that a dividend was paid on the Franklin Trust Company stock on October 1, 1931 (p. 47, Transcript of Record in Circuit Court, No. 6157). The referee decided the loss occurred in 1932. The District Court reversed the referee on that and held the loss occurred in 1931 (*In re Hoffman*, 16 Fed. Supp.

391). This was affirmed in *Yocum v. Rothensies,* 87 Fed. 2d 200. The Circuit Court, it is true, upheld the decision that the loss was in 1931, not 1932, but the court added that the taxpayer had not charged the loss off, and therefore it could not be allowed. This, no doubt, was the real reason for the decision of the Circuit Court, because a loss, no matter when sustained, cannot be allowed unless it is charged off. Hence, it was not necessary for the Circuit Court to upset the decision of the District Court. The District Court reasoned it was more practical as a business matter to hold the stock became worthless when the bank closed. But that is not the correct test to establish a loss on worthless stock. The proper test is when has the stockholder lost all reasonable possibility of getting something out of the stock (*Montgomery v. U. S.,* supra). Furthermore, it is difficult to see how the stock could become worthless within a week after a dividend was paid. Hence, it is apparent that the District Court erred in the test it applied in the *Hoffman* case and the decision of the Circuit Court was not a precedent for the present case because in the *Hoffman* case the taxpayer has not charged off the loss.

In the case at bar, the decedent taxpayer charged off the loss in 1932. Moreover, the record is much fuller and more complete than in the *Hoffman* case. Your petitioners had many more witnesses and much stronger testimony. In *Bancroft v. Commissioner* (supra), the Court of Claims refused to follow the District Court of Massachusetts which had previously held that stock in a certain bank was worthless in 1932 when the bank closed. The Court of Claims in that case said (p. 233):

> "We are unable to agree with the District Court that this loss occurred in 1932. The record before that

court was by no means so full as the one before us. What its decision would have been had it had before it all the facts now presented is a matter of conjecture."

Therefore, the Circuit Court of Appeals erred in following the *Hoffman* case because the record now before the court is very complete whereas in the *Hoffman* case it was not and the testimony developed was very meagre.

5. Conclusion.

It has been shown that the loss on the stock involves a mixed question of law and fact because the effect of the closing of the bank and the filing of the appraisal is a matter of law and the Circuit Court of Appeals should have reversed the Board of Tax Appeals. It has also been shown that even if this is a question of fact only that there was no substantial evidence to support the Board of Tax Appeals' decision and the Circuit Court of Appeals should have reversed the Board of Tax Appeals. It has further been shown the decision of the Circuit Court of Appeals is contrary to the decisions of the Board of Tax Appeals, the Court of Claims and the District Court of Arkansas. It has further been shown that the Circuit Court of Appeals erred in following the *Hoffman* case.

It is therefore respectfully submitted that the writ of certiorari should be granted as prayed for, and the decision of the Circuit Court of Appeals should be reviewed.

Respectfully submitted,

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Harry J. Alker, Jr.,
Counsel for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 247

HENDERSON SUPPLEE, JR., MRS. MARIE SUPPLEE DICKSON AND MRS. ELIZABETH S. KIRK, EXECUTOR AND EXECUTRICES OF THE WILL OF C. HENDERSON SUPPLEE, DECEASED, AND MRS. C. HENDERSON SUPPLEE, SURVIVING WIFE, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 181–188)[1] is not reported. The *per*

[1] Pursuant to stipulation (R. 194), the printed record for purposes of this petition consists of the appendix to petitioners' brief in the court below plus the proceedings in the court below.

curiam opinion of the Circuit Court of Appeals (R. 191) is reported at 119 F. (2d) 423.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 8, 1941 (R. 192). The petition for a writ of certiorari was filed on July 8, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there is substantial evidence to support the finding of the United States Board of Tax Appeals that taxpayer's stock in the Franklin Trust Company of Philadelphia became worthless in the year 1931, rather than in 1932.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1928, 45 Stat. 791:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—
>
> (1) if incurred in trade or business; or
>
> (2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft.

* * * * *

(j) *Bad debts.*—Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part.[2]

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

ART. 171. *Losses.*—Losses sustained by individuals during the taxable year and not compensated for by insurance or otherwise are fully deductible (except by nonresident aliens, see section 213 and article 1051) if—

(*a*) Incurred in a taxpayer's trade or business, or

(*b*) Incurred in any transaction entered into for profit, or

(*c*) Arising from fires, storms, shipwreck, or other casualty, or theft.

Losses sustained by corporations during the taxable year and not compensated for by insurance or otherwise are deductible.

Losses must usually be evidenced by closed

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[2] The corresponding provisions of the Revenue Act of 1932, 47 Stat. 169, are identical with the provisions set out in the text.

and completed transactions. The basis for determining the amount of the deduction for losses is the same as is provided in section 113 for determining the gain or loss from the sale or other disposition of property. * * *

* * * * *

ART. 174. *Shrinkage in value of stocks.*— A person possesssing stock of a corporation can not deduct from gross income any amount claimed as a loss merely on account of shrinkage in value of such stock through fluctuation of the market or otherwise. The loss allowable in such cases is that actually suffered when the stock is disposed of. If stock of a corporation becomes worthless, its cost or other basis determined under section 113 may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness be made, as in the case of bad debts. * * *[3]

* * * * *

STATEMENT

This case involves the income tax liability of C. Henderson Supplee for the year 1932, who has since died and whose interests are represented in this case by the petitioners.

The issue is whether the taxpayer was entitled to a deduction for the year 1932 by reason of the

[3] Articles 171 and 174 of Treasury Regulations 77, promulgated under the Revenue Act of 1932, are for present purposes identical with those set out in the text.

worthlessness of his investment in the Franklin Trust Company of Philadelphia. The Board of Tax Appeals found that the worthlessness had occurred in 1931 rather than in 1932, and the facts supporting that finding may be summarized as follows:

The taxpayer was a stockholder of the Franklin Trust Company of Philadelphia, which had closed its doors on October 5, 1931 (R. 14, 33, 183), and has never since reopened. Under date of June 29, 1931, the Banking Department of the State of Pennsylvania had examined the records of the Franklin Trust Company and had reported (Pet. Ex. 1) that the 300,000 outstanding shares of stock of the Trust Company of par value $10 per share, had a book value of approximately $21.50 per share (R. 9, 182). By the time the Franklin Trust Company closed, its portfolio admittedly had been "skimmed of a lot of the cream,"[4] (R. 34; cf. R. 156), and the remaining assets, such as real estate mortgages (R. 34–35), were nonliquid (R. 15). The general business situation in and around Philadelphia between October 5, 1931, and the end

[4] The Trust Company's difficulties had been accentuated, if not precipitated, by the closing on December 22, 1930, (R. 23) of the Bankers Trust Company of Philadelphia. The closing of the Bankers Trust led to a run on the Franklin Trust Company; in the course of this run, the Franklin Trust Company's loss of deposits amounted to approximately $15,000,000 (R. 14–15, 23, 182). To meet this sudden demand, the Franklin Trust Company had disposed of most of its quick securities (R. 24).

of 1931 "wasn't good." Rather than improving at that time, "it stayed at a low level" (R. 28; cf. R. 182).

The Board of Tax Appeals found (R. 182–183) that at or about the end of September 1931—

> The position of the Franklin Trust Co. was precarious. It had borrowed substantial amounts of money from the Philadelphia Clearing House Association, and asked for a further loan about the first of October. A Committee of the Clearing House Association made an examination of the Trust Company's books and determined that the Trust Co. was insolvent. It did, however, advance to the Trust Co., upon the security of its choicest assets, $1,000,000 [on Monday, October 5, 1931, to enable the Trust Company to open and do business that day].

(See also R. 41–42, 128, 133–134, 156.)

On October 5, 1931, three of the largest depositors in the Trust Company presented their demands for more than the one million dollars which had been advanced that morning by other banks through the Clearing House Association (R. 42, 133–134, 183). These demands were not honored on the ground that to pay them would be unfair to other depositors. The other banks in Philadelphia would advance no more funds to the Franklin Trust Company. At 12:01 A. M., October 6, 1931, the Company was placed in the hands of the Banking

Department of the Commonwealth of Pennsylvania (R. 14, 33, 42, 55, 57–58, 183).[5] The Company thereafter refused to receive deposits and ceased to operate as a commercial bank (R. 183).

After taking possession on the morning of October 6, 1931, the employees of the Pennsylvania Banking Department, under the supervision of Dr. Gordon, the Department's Secretary, "endeavored to hastily prepare" an inventory of the assets and liabilities of the Trust Company (R. 55). This was "merely an assemblage of book values," a "presentation of book values of assets and liabilities" and did not represent an attempt to appraise the assets (R. 56). The State Banking Department found that the Trust Company at the time it closed its doors had assets of a book value of $37,828,-146.43 and liabilities of $27,149,637.71; $11,031-123.35 of the liabilities were secured or offset by amounts due the Trust Company (R. 183).[6]

For some time after the Franklin Trust Company closed, some of its officers and stockholders worked on reorganization plans. These efforts continued to June 1932 (R. 18, 20–21, 33, 36, 43–44,

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[5] The Franklin Trust Company was one of the forty-four banks taken over by the Banking Department of Pennsylvania in October 1931 (R. 55, 65, 182).

[6] Notwithstanding these book figures the subcommittee of the Clearing House Committee, which had appraised Franklin Trust's assets a few weeks before, reported the Trust Company as insolvent (R. 128).

183),[7] but they proved futile (R. 33). "Not a penny" was secured toward reorganization and not even expenses were paid for the attorney of the Franklin Trust Company, who worked on the reorganization plans (R. 37).

Meanwhile, on December 15, 1931, the Secretary of Banking ordered the liquidation of the Trust Company (R. 47, 57, 183) because, he testified, the bank was unable either to meet its obligations or to raise additional money (R. 58).[8] No appraisal of the assets had been made at that time. The book value of these assets far exceeded the total liabilities of the Trust Company but it was apparent to all concerned that many of the assets had suffered a great shrinkage in value and many of them were unsalable (R. 183). According to the special deputy whom the Secretary of Banking placed in charge of the affairs of the Franklin Trust Company "when Dr. Gordon gave his liquidating order, personally, I had no hope" (R. 47).

From the October 1931 inventory (at book values) which was at hand at the time the Secretary of Bank-

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[7] The schemes for reopening all depended upon (a) persuading the large depositors to make no demands for their deposits for five or ten years, so that the Trust Company could work out its slow assets, and (b) bringing some new money into the organization (R. 33-34).

[8] The Secretary of Banking testified that he decided to issue the liquidation order without first determining the question of solvency "based on a factual appraisement of the market value of the assets" (R. 59).

ing ordered liquidation, it would have been impossible, the Secretary testified, for "any one on earth" to have "predicted values" of assets (R. 57). An appraisal was necessary for the purpose, but two or three months were required to prepare it (R. 56). Thus " * * * the relation between * * * assets and * * * liabilities was not definitely settled until the inventory and appraisement were filed in 1932" (R. 47). The appraisers filed their report[9] with the Secretary of Banking in June 1932 (R. 46, 183). The appraisal showed that the book value of the Trust Company's assets at the time the state authorities took possession was $37,828,146.43, but that the actual value of the assets was only $19,236,439.74. The appraisal showed total liabilities of $27,149,637.71, including offsets and secured liabilities of $11,031,123.35, leaving total net liabilities unsecured of $16,118,514.36. The total net available assets to meet such unsecured liabilities was $8,205,316.39 (Ex. 2; R. 183–184).

The liquidation of the Franklin Trust Company was still in progress at the time of the first trial, November 22, 1938. Stockholders had received

[9] The appraisal was prepared by Mr. Norman Hayes, a vice president of the Philadelphia National Bank, and Mr. Frank Felton, of the J. C. Jackson Realty Company, whom the Secretary of Banking had appointed as appraisers on January 18, 1932, to appraise the company's assets at their actual market value as of the date when the Franklin Trust Company closed (R. 21, 22, 46, 57, 71, 122, 183).

nothing. Dividends of from 30 cents to 40 cents on the dollar had been paid to depositors (R. 184). Although small additional dividends may be paid to the depositors, the total amount will be small (R. 184).[10]

On the basis of this evidence the Board of Tax Appeals found that the shares of stock of the Franklin Trust Co. became unsalable and absolutely worthless in 1931.[11] The Circuit Court of Appeals affirmed (R. 191) the finding and decision of the Board.

ARGUMENT

The decision of the court below affirming the determination of the Board of Tax Appeals was correct and there is no conflict with the decisions cited by the petitioners.

1. It has been repeatedly and uniformly held that the time when stock becomes worthless is a question of fact to which the substantial evidence rule applies.[12] *Foster* v. *Commissioner*, 112 F. (2d) 109,

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[10] During Dr. Gordon's term as Secretary of Banking, the Department of Banking had ordered 157 banks liquidated (R. 58, 64). In the case of only one of these banks was any payment made to the stockholders (R. 65; cf. R. 59).

[11] See also the Board's opinion (R. 187).

[12] Petitioners cite no case to the contrary. ~~Taxpayer~~ does, however, contend (Pet. 5) that this case involves a mixed question of fact and law, citing *Helvering* v. *Rankin*, 295 U. S. 123, 131; and *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 491. The short answer to this is that neither case was concerned with the issue of when stock becomes worthless; they hold only that other issues of taxation sometimes do

113 (C. C. A. 1st); *Thompson* v. *Commissioner,* 115 F. (2d) 661, 662 (C. C. A. 2d); *Bartlett* v. *Commissioner,* 114 F. (2d) 634, 641 (C. C. A. 4th); *Brown* v. *Commissioner,* 94 F. (2d) 101, 103 (C. C. A. 6th); *Industrial Rayon Corp.* v. *Commissioner,* 94 F. (2d) 383 (C. C. A. 6th); *Rand* v. *Helvering,* 116 F. (2d) 929, 933 (C. C. A. 8th); *Bancroft* v. *United States,* 33 F. Supp. 225, 233 (C. Cls.).

The facts set forth in the Statement, *supra,* pp. 4–10, amply indicate that there is substantial evidence to support the Board's finding that the stock in the Franklin Trust Company "became unsalable and absolutely worthless in 1931" (R. 184). By October 5, 1931, the Trust Company had virtually stripped itself of liquid assets (R. 34–35); it was unwilling to meet the demand of its depositors (R. 42, 133–134, 183); it was determined to be insolvent by a committee of the Clearing House Association (R. 128); it could obtain no more funds (R. 42). On October 6, 1931, it was taken over by the Banking Department (R. 14, 33, 55, 57–58, 183). At

present a mixed question of fact and law. This we do not dispute. Further in support of the contention that something more than a question of fact is here involved, petitioners cite a series of Pennsylvania decisions holding that a receiver may be appointed for a corporation even though it is solvent (Pet. 6). But these cases are irrelevant to the issue whether this is a mixed question of fact and law. The Board of Tax Appeals did not hold that mere receivership as a matter of law results in worthlessness of the stock of a corporation, but based its conclusion on many facts not limited to receivership.

that time, the Trust Company had assets of only $19,236,439.74 to meet liabilities of $27,149,637.71 (Pet. Ex. 2; R. 183–184). Throughout the remainder of the year 1931, it was unable to raise any funds whatsoever, and it could not even pay expenses to its attorney (R. 33, 37). On December 15, 1931, the Secretary of Banking ordered it liquidated (R. 47, 57, 183), and at that time, his deputy, who had been in charge of the company's affairs for over two months, "had no hope" (R. 47).

The Board's findings of fact, thus fully supported by substantial evidence, are conclusive on appeal. Cf. *Helvering* v. *Kehoe,* 309 U. S. 277, 279; *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282, 285, 294; *Elmhurst Cemetery Co.* v. *Commissioner,* 300 U. S. 37, 40; *Hulburd* v. *Commissioner,* 296 U. S. 300, 306.

2. Petitioners contend that five cases are in conflict with the decision of the court below (Pet. 3–4, 8–13). One of these allegedly conflicting cases was decided by a district court;[13] two by the Court of Claims;[14] and two by the Board of Tax Appeals.[15]

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[13] *Sherrill* v. *Adkins* (E. D. Ark.), decided December 2, 1939, not officially reported but found in 1940 C. C. H., Vol. 4, par. 9154.

[14] *Bancroft* v. *United States,* 33 F. Supp. 225; *Lyon* v. *United States,* 5 F. Supp. 138.

[15] *Terhune* v. *Commissioner,* 40 B. T. A. 750; *Watson* v. *Commissioner,* 38 B. T. A. 1026. In any event, even a squarely contrary decision of the Board does not constitute authority for reversing another decision of the Board. *Rogers* v. *Commissioner,* 103 F. (2d) 790, 793 (C. C. A. 9th).

But the issue of when stocks become worthless is entirely factual and must be resolved in each case by the facts disclosed by the particular record. The facts upon which each of these five cases turn differ substantially from the facts of the instant case. Moreover, each of these cases was decided by a tribunal of original jurisdiction, whereas the basic issue in the court below was simply whether the Board's findings were supported by substantial evidence.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The case turns upon its own facts and presents no question of general application. The petition should be denied.

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